No. 12,394

IN THE

United States Court of Appeals

For the Ninth Circuit

MYRTLE CANON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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Subject Index

Page

Statement of pleadings, jurisdiction and facts 1

Question presented 4

Specification of errors 4

I.

"Scope of employment" must be decided under California law 5

II.

The doctors and nurses who treated plaintiff were acting within the scope of their employment 6

III.

The federal government should be treated no differently than a private person in this regard, under the Federal Tort Claims Act 9

IV.

The federal government owed plaintiff the duty of careful treatment once her treatment had been undertaken at DeWitt Hospital 13

V.

The admission of plaintiff to DeWitt Hospital was authorized by the applicable army regulations 16

Table of Authorities Cited

Cases

	Pages
Aetna Ins. Co. v. U. S., ... U.S. ....., 70 S. Ct. 207	10
Andrews v. Seidner, 49 C. A. (2d) 427	7
Griffin v. County of Colusa et al., 44 C. A. (2d) 915	15
Hubsch v. U. S., 174 Fed. (2d) 7	12
Meadows v. U. S., 281 U. S. 271	19
Murphey v. U. S., 179 F. (2d) 743	6
Oettinger v. Stewart, 24 C. (2d) 133	13
Oman v. U. S., 179 F. (2d) 738	10
Schuyler v. U. S., 227 U. S. 601	14
Sessions v. Southern Pacific (1911), 159 Cal. 599	13
Stansell v. Safeway Stores, 44 C. A. (2d) 822	7
Sylva v. Providence Hospial, 14 C. (2d) 762	15
U. S. v. Campbell, 172 F. (2d) 500	12
U. S. v. Eleazer, 177 F. (2d) 914	6
U. S. v. Williams, 278 U. S. 255	19

Statutes

Army Regulations 40-590 is Section 77.2 of Title 10, Code of Federal Regulations, now found re-codified in Chapter 5 of 32, Code of Federal Regulations	3, 17
Federal Tort Claims Act (28 U.S.C. et seq.; 28 U.S.C. 1291, 1346(b), 1402(2), 1504, 2110, 2401(b), 2402, 2411, 2412(c) and 2671-2680)	1
28 U.S.C. Section 225	2
28 U.S.C.A. Section 1346(b)	5, 9

Texts

	Pages
42 Am. Jur., Public Administrative Law, Section 211	19
Restatement of Agency:	
Section 229	7
Section 230	8
Section 242	14
Restatement of Torts:	
Section 324	15
Section 346	14

Other Authorities

Sen. Rep. 1400, 79th Cong. 2nd Sess., Sen. Rep. 1196, 77th Cong. 2nd Sess., House Rep. 2428, 76th Cong. 3rd Sess. 9

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STATEMENT OF PLEADINGS, JURISDICTION AND FACTS.

Plaintiff brought this action under the Federal Tort Claims Act (28 U.S.C. *et seq.,* prior to its codification and re-enactment as 28 U.S.C. 1291, 1346(b), 1402(2), 1504, 2110, 2401 (b), 2402, 2411, 2412 (c) and 2671-2680, hereinafter referred to, for convenience as the Tort Claims Act), to recover damages for personal injuries.

The complaint (Record p. 2) alleged that plaintiff was operated upon for varicose veins, and afforded post-operative treatment, at DeWitt General Hospital, a hospital operated by the War Department of the United States of America; that the doctors and nurses who operated on plaintiff and gave her such

post-operative treatment were acting within the scope of their employment in so doing; that such operation and such treatment were negligently done, by reason of which negligence plaintiff developed a phagedenic ulcer, which is still unhealed. The answer was a general denial.

The case was heard at San Francisco, California on March 22, 1949, before the Honorable Louis Goodman, District Judge, sitting without a jury. At the close of the plaintiff's case, the Honorable District Court took under submission defendant's motion for a dismissal, which motion was granted, on grounds which appear in Judge Goodman's findings of fact, conclusions of law, and written opinion, on April 8, 1949.

Findings of fact, conclusions of law, and a written opinion were filed (Record pp. 9, 15) and judgment was entered (Record p. 25) on August 30, 1949, on the ground that the doctors and nurses upon whose negligence plaintiff based her cause of action, were not acting within the scope of their employment by the Federal Government in treating plaintiff. Plaintiff's notice of appeal was filed September 28, 1949, within the time allowed by law.

Jurisdiction of the District Court arises from the Federal Tort Claims Act, and jurisdiction of this Court arises under 28 U.S.C. Sec. 225 to review the final judgment of the District Court.

Plaintiff Myrtle Canon, a civilian employee of the War Department, stationed at DeWitt General Hospital, an Army hospital ten miles from Auburn, Cali-

fornia, was admitted as a patient to DeWitt General Hospital by order of its commanding officer, Colonel Smith, for surgical treatment of varicose veins, and was operated upon at DeWitt General Hospital by Army surgeons on June 14, 1945.

Plaintiff was a medical secretary, employed at the time of her admission, as secretary to the chief of the vascular surgery section of the hospital. She had been employed in a clerical capacity (Record pp. 41, 42, 43) in other Army hospitals prior to her employment at DeWitt, and had suffered from varicose veins, which (Record p. 45) grew worse during her employment by the Army.

Prior to her admission to the hospital, she had requested that her resignation be accepted so that she might seek surgical relief for her condition in San Francisco. Her resignation was refused by Colonel Stark, head of the surgical section of the hospital, who stated that he had no replacement for plaintiff, and needed her experience, since personnel was difficult to obtain (Record pp. 45, 46). Colonel Stack offered plaintiff surgical treatment at DeWitt General Hospital, so that her work would suffer as slight an interruption as possible (Record pp. 46, 47). Plaintiff was admitted by Colonel Smith under Army Regulation 40-590, sec. 6(b) (13) (Plaintiff's Exhibit 3, page 1), as a civilian employee of the Federal Government who had contracted an occupational disease in the performance of her official duties.

Plaintiff underwent surgery for varicose veins, and post-operative treatment at DeWitt General Hospital.

An infection of the surgical wound developed because of the negligence of the operation and post-operative care, which caused the development of a phagedenic ulcer; plaintiff has been bed-ridden and incapacitated from the time of her operation to the present by this ulcer, and will continue to be so for an indefinite time to come, as well as being subjected to the necessity of procuring expensive medical treatment, and of undergoing many operations, for the said ulcer.

The dismissal was granted the Government in this case on the sole ground that plaintiff's admission to DeWitt General Hospital was unauthorized by A.R. 40-590, and that therefore the acts of the doctors and nurses who operated on her and treated her were outside the scope of their employment.

QUESTION PRESENTED.

The principal questions presented here are: 1. whether the District Judge erred in finding that the acts complained of were outside the scope of employment of the employees who performed them, and 2. whether the District Judge erred in finding that plaintiff's admission to DeWitt General Hospital was unauthorized.

SPECIFICATION OF ERRORS.

The District Court erred:

1. In finding that Dr. William Rector, Dr. Norman Freeman, and the doctors, nurses, attendants or other employees of the United States attached to, or

assigned to DeWitt General Hospital were not authorized to furnish plaintiff with surgical or post-surgical care, and were not acting within the scope of their employment by the Federal Government in furnishing such care.

2. In finding as a fact that Colonel William Smith was not authorized to admit plaintiff to DeWitt General Hospital.

3. In granting defendant's motion for dismissal.

I.

"SCOPE OF EMPLOYMENT" MUST BE DECIDED UNDER CALIFORNIA LAW.

The preliminary question of the law to be applied to the question raised by the instant case merits but little discussion.

The words of the Tort Claims Act themselves provide the primary authority for the proposition that it is California law to which the Court must look for a definition of the "scope of employment" of the Federal employees whose negligence is here complained of.

Section 1346 (b) of U.S.C.A. Title 28 provides recovery for:

> "* * * personal injury or death caused by the negligent act * * * of any employee of the Government while acting within the scope of his employment under circumstances where the United States, if a private person, would be liable to the claimant * * * *in accordance with the law of the place where the act or omission occurred* * * *." (Italics supplied.)

In *U. S. v. Eleazer,* 177 Fed. (2d) 914, at page 917, it is held, under the Tort Claims Act, that "scope of employment" is to be decided under the law of the place where the negligent act was done, citing other Circuit Court opinions decided under the Act. See also this Court's opinion in *Murphey v. U. S.,* 179 Fed. (2d) 743. No decision has been found holding otherwise, and since there is no Federal common law, and no Federal definition of "scope of employment" no other source for such authority than local law is possible.

II.

THE DOCTORS AND NURSES WHO TREATED PLAINTIFF WERE ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT.

The basic question in this case is whether the doctors and nurses who operated on plaintiff and treated her after her operation were acting within the scope of their employment in so doing.[1]

What act could be more clearly within the scope of employment of the medical staff of a hospital than the acts here complained of? These doctors and nurses were doing precisely what they had been hired to do, in the hospital in which they had been hired to work, using the facilities furnished them by their employer for such work, during the hours in which they were on duty, with the purpose of carrying forward their

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[1]Whether or not Colonel Smith, the Commanding Officer of the hospital, was within the scope of his employment in admitting plaintiff is not the question here; no negligence on his part is alleged as a ground for recovery.

employer's enterprise, and not in furtherance of any purpose of their own.

The *Restatement of Agency,* sec. 229, sets forth the generally accepted tests of "scope of employment", which are those enumerated above—use of the employer's facilities, performance of kind of work the employee was hired to do, and the performance of such tasks with the purpose of aiding the employer or carrying forward his business. The cases cited in the *California Annotations* to the cited *Restatement* section show beyond question California acceptance of these tests, as tests of the extent of "scope of the employment".

Particular attention is directed to the last test, which has been recognized as crucial—whether or not in doing the act complained of, the employee had the purpose of furthering his own ends, or the ends of his employer.

In *Stansell v. Safeway Stores,* 44 Cal. App. (2d) 822, a case involving an assault by a store manager on a customer, the Court says:

> "* * * liability still exists, even if the servant's act is malicious or wilful, if the act is one which is done *in furtherance of the purpose of the employment.*" (Italics supplied.)

See, also, *Andrews v. Seidner,* 49 Cal. App. (2d) 427, a similar case.

Since neither the doctors nor the nurses whose negligence injured plaintiff were on a frolic of their own, or had any other purpose in their care of plain-

tiff than the furtherance of the ends of the Federal Government, they must be held to have been acting within the scope of their employment in so acting.

It is submitted that the error committed in this case is caused by a confusion between two concepts in the law of agency, "authority" and "scope of employment", confusion which these California cases should dispel.

It is clear from these cases, and from *Restatement of Agency,* Sec. 230, that the *authority* of employee to do a particular act, or his lack of *authority* to do that act, is only important as between himself and his employer. It has no bearing on the relationship between his employer and the outside world. It is, in fact, a commonplace of agency law, as shown by the cases cited, that even if an employee has been expressly forbidden to do a particular act, the act may yet be within the scope of his employment, and his doing the act may yet, therefore, subject his employer to tort liability to third persons injured thereby.

It should be pointed out that nowhere in the cases is "authority" or lack of it used as a measure of scope of employment, or even as one of several tests for the extent of scope of employment. Yet in this case (see Record pp. 12, 13, 14) the District Court has made *authority* the measure of *scope of employment.*[2] If this confusion is cleared away, and the cor-

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[2]It should be pointed out here that the cases cited in support of the District Court's opinion are all cases dealing with the power of an agent to bind the federal government to a *contract*, a field of agency law in which "authority" is the key question (Transcript, p. 12, bottom).

rect tests applied to the question in this case, the *scope of the employment* of these Federal employees must be held to have clearly included the acts here complained of.

III.

THE FEDERAL GOVERNMENT SHOULD BE TREATED NO DIFFERENTLY THAN A PRIVATE PERSON IN THIS REGARD, UNDER THE FEDERAL TORT CLAIMS ACT.

The argument has been made that the scope of employment of a Federal employee, under the Tort Claims Act, is limited to the acts which he has the "authority" to do, because of the peculiar nature of the Federal Government.

With all due respect to the District Court whose action in this case is founded on this position, the Tort Claims Act itself, its legislative history, and the cases decided under it all say otherwise.

The Act itself, twice in two adjoining sentences (28 U.S.C.A. Sec. 1346 (b)), provides liability for the United States *as for a private person in the same circumstances.* This provision of the Act explicitly equating the Federal Government and a private person in the same circumstances is underlined by the fact that every committee report accompanying the Tort Claims Act or its predecessors specifically picks out for mention this feature of the Tort Claims Act. See Sen. Rep. 1400, 79th Cong. 2nd Sess., which accompanied this Act, Sen. Rep. 1196, 77th Cong. 2nd Sess., and House Rep. 2428, 76th Cong. 3rd Sess.

See, also, *Aetna Ins. Co. v. U. S.*, ... U.S. ....., 70 S. Ct. 207, which holds that the United States must defend suits by a subrogee exactly as a private person must; the Supreme Court states, in this connection (70 S. Ct. 215):

> "*The broad sweep of its (The Tort Claims Act) language assuming the liability of a private person,* the purpose of Congress to relieve itself of consideration of private claims, and the fact that subrogation claims made up a substantial part of that burden, are also persuasive that Congress did not intend that such claims should be barred."

The Court held that subrogated claims may be sued on, in spite of the fact that by so holding they may have subjected the Government to two suits on a single claim.

Since a private person is not protected from tort liability arising from an employee's unauthorized act, the Federal Government should not be; it is the clear intent of Congress that for these purposes, the Federal Government must be treated as a private person.

Exact authority on this point is furnished by *Oman v. U. S.*, 179 Fed. (2d) 738.

In that case, plaintiff alleged that a Federal employee wrongfully refused to cancel certain grazing rights granted to his predecessor in title, and that the same employee encouraged other grazers to infringe grazing rights which were plaintiff's. Action against the Federal Government was brought under the Tort Claims Act, and the Government demurred.

The Government's demurrer was on the ground that the acts complained of were either discretionary, which barred tort liability under a specific exception contained in the Tort Claims Act, or, if not discretionary, were unauthorized, and therefore were outside the scope of the employee's employment.

The 10th Circuit reversed an order sustaining this demurrer, holding that the acts were not discretionary, but that it was mandatory for the employee to revoke the grazing rights; on the issue of "authority" the Court said:

> "It is suggested that if the alleged acts are non-discretionary, they could not, perforce, have been committed within the scope of employment. A principal is liable civilly for the tortious acts of his agent which are done within the course and scope of the agent's employment even though the principal did not authorize, ratify, participate, or know of such misconduct. But a principal is not liable to third persons for torts committed by his agent acting outside the scope of his employment. If the agent goes outside his employment and *acts not in furtherance of the principal's business but to effect some purpose of his own,* the principal is not liable." (Italics supplied.)

The Circuit Court in the *Oman* case sent the case back for a determination of the issue of the purpose of the employee, as a question of fact.

Thus the case holds that the *same test* which California applies to determine whether or not an act is within the scope of private employment applies to

determine whether a Federal employee is within the scope of his employment—*furtherance of the business of the employer. Lack of authority, even an express order not to do the act done, does not determine or affect the scope of employment* of either a private or a Federal employee.

Nor should "authority" make a difference to the instant case.

Yet, as has been pointed out, this is precisely the ground of the opinion of the District Court in this case.

In that opinion (Transcript p. 11, 2nd paragraph) the Court states:

> "The first question to be considered is therefore, what was the 'scope of authority' or 'line of duty' of the Commanding Officer and the physicians who attended Miss Cannon?"[3]

and (Transcript p. 12, second paragraph):

> "There is no question but that the Government of the United States acts only through its agents with power delegated and defined by statute or regulation, * * *"

It is submitted that under the authority cited, this position is clearly wrong, and the action taken by reason of this holding should be reversed.

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[3]The phrase "line of duty" does not restrict the extent of "scope of employment," but has been held in *Hubsch v. U. S.*, 174 Fed. (2d) 7, and *U. S. v. Campbell*, 172 Fed. (2d) 500, to be equivalent to, though not broader than, "scope of employment".

IV.

THE FEDERAL GOVERNMENT OWED PLAINTIFF THE DUTY OF CAREFUL TREATMENT ONCE HER TREATMENT HAD BEEN UNDERTAKEN AT DeWITT HOSPITAL.

Implicit in Judge Goodman's opinion in this case, and underlying his action herein, though perhaps not put into words, is the feeling that because plaintiff's admission to DeWitt General Hospital was in excess of the authority of its commanding officer, the Federal Government owed no duty of care to plaintiff.

It is submitted that there is a duty of due care imposed on the owner of a hospital whose employees have undertaken the care of a patient—the duty to avoid injury to the patient by *negligent act,* when her presence is known.

In *Sessions v. Southern Pacific* (1911), 159 Cal. 599, a conductor of defendant railway permitted plaintiff to ride defendant's train without paying fare, a wilful and knowing violation of company rules, by both plaintiff and the conductor. The train was wrecked by the negligence of defendant's employees.

The California Court held that because trespassers were owed no other duty than the duty to refrain from "wilful and wanton neglect", and because plaintiff had not shown such neglect, plaintiff could not recover.

This, of course, was the Tort rule which further, more modern, judicial thinking has discarded, in California as elsewhere. The modern California rule, as to trespassers whose presence is known, is contained in *Oettinger v. Stewart,* 24 Cal. (2d) 133, which holds

that a known trespasser is owed a duty of due care in the conduct of the landowner's activities, however slight the duty of a landowner is with respect to the condition of the land on which the trespasser comes. *Restatement of Torts,* Sec. 346, is additional and persuasive authority for this position, *where, as here,* the trespass is not the result of an invitation by the negligent employee. See also *Restatement of Agency,* Sec. 242, comment a.

Schuyler v. U.S., 227 U.S. 601, while not a California case, is closer to the present facts than any case found, and is persuasive authority here.

In that case, plaintiff obtained passage on defendant's train by use of a pass whose use was forbidden by the Hepburn act, though both plaintiff and defendant in good faith thought otherwise. Plaintiff was injured by the negligence of defendant's employees, and was allowed to recover though defendant urged his lack of right to passage, and that he was, in that respect a "trespasser" on the service of defendant, much as plaintiff here was assumed to be a "trespasser" on the service of the hospital.

The Court in the *Schuyler* case held that plaintiff though not on the train by right, was nevertheless not an outlaw; so here, it must be said, that even though plaintiff had no right to service at this hospital, she was not an outlaw therein, and was entitled to care in the service which was rendered to her by defendant's employees.

Even if the Federal Government was a mere volunteer in assuming treatment of plaintiff, the current

of tort law in California is to impose a duty of careful treatment on the volunteer once treatment is begun. Though no duty to treat is owed, yet a private person who assumed to treat plaintiff would render himself liable under current holdings for doing so negligently.

Thus in *Griffin v. County of Colusa et al.,* 44 Cal. App. (2d) 915, it was held that a mere volunteer assuming to treat a patient who had no right to such treatment owed the duty of careful treatment when treatment was once begun. The Court there said (44 Cal. App. (2d) p. 923, bottom):

> "When one has undertaken to render assistance or care, even as a volunteer, the law imposes a duty of care towards the person assisted (Restatements of Torts, Sec. 324)."

Liability of the County of Colusa, the employer of the volunteer, was denied on the ground that California law still includes the doctrine of sovereign immunity from suit, which the Federal Government has, of course, specifically waived by the Tort Claims Act. See also *Sylva v. Providence Hospital,* 14 Cal. (2d) 762, at p. 765, also citing *Restatement of Torts,* Sec. 324.

Whatever plaintiff's status was vis-a-vis the Federal Government which owned and operated DeWitt General Hospital, and directed the activities of its personnel, even if she was a trespasser, therefore, once the Federal Government undertook to treat her, it was under a duty to treat her carefully.

V.

THE ADMISSION OF PLAINTIFF TO DeWITT HOSPITAL WAS AUTHORIZED BY THE APPLICABLE ARMY REGULATIONS.

It is admitted that DeWitt General Hospital was an Army hospital, conduct of which is governed in part by Army Regulation 40-590, a copy of which was furnished the District Court, and the District Court took judicial notice, though it was not introduced into evidence.

The records of DeWitt Hospital (Plaintiff's Exhibit No. 3, p. 1), show the basis for plaintiff's admission to DeWitt as Par. 6b (13) A.R. 40-590. A.R. 40-590 provides:

"Sec. 2. *General Duties of Commanding Officer*

* * * * * * *

(b) Patients.

1. The Commanding officer, or one of the commissioned assistants will determine *which patients are to be admitted or discharged from the hospital.*

* * * * * * *

Sec. 6. *Who may be admitted to Army Hospitals*

* * * * * * *

(b) *List*

* * * * * * *

(13) Civilian employees of the United States Government compensable by the United States Employee's Compensation Commission who suffer personal injury while in the performance of official duty, or who acquire a disease as a natural result of such injury, or who acquire an occupational disease, in the performance of official duty."

Likewise pertinent, though not contained in *A.R. 40-590 is Sec. 77.2, of Title 10, Code of Federal Regulations* (now found re-codified in *Chapter 5 of 32, Code of Federal Regulations,* since the unification of the former Departments of War and Navy). This section provides:

> "Sec. 77.2 *For whom authorized.* Under the conditions indicated herein, the Army will, usually through its own facilities, provide medical attendance to the personnel enumerated in Paragraphs (a), (b), and (c) of this Section.
> * * * * * * *
> (c) *Civilian*
> * * * * * * *
> (4) Civilian employees of the Army at stations where other medical attendance cannot be procured.
>
> (5) Civilian employees of the United States government who receive personal injuries in the performance of official duties who may report for treatment at any Army dispensary or hospital upon request of the officer under whom they are employed, provided other government hospitals for treatment of such employees are not convenient of access."

Clearly the decision as to whom to admit to an Army hospital is placed, originally, within the jurisdiction of the commanding officer. The words of the regulation themselves make this clear; indeed, any other administrative device might well result in loss of life, or great hardship, while a more ponderous proceeding was held to determine whether or not a particular civilian was admissible to an Army hospital.

As the record shows, Colonel Smith decided, from the facts available to him, that plaintiff qualified for admission as a civilian employee who had contracted an occupational disease in the performance of her official duties. What facts were before Colonel Smith when he decided this, of course, are not known to this Court, and were not known to the District Court. Evidence that plaintiff's varicose veins were made worse by her service with the Army is contained in the record of this case (see Transcript p. 45, center of page). No evidence was introduced by any party tending to show a lack of connection between the worsening of plaintiff's condition and her employment by the Army.

It is submitted that it does not lie within the power of the District Court to substitute its finding on the question of fact of causal connection between plaintiff's disease and her employment for the finding of the administrative officer to whom Congress has committed the task of deciding it. To do so violates the fundamental principle of administrative law that the judiciary will not assume executive or administrative duties, and will not (in the absence of fraud, or such mistake of fact as to amount to arbitrariness), remake a decision which an executive officer, acting within his jurisdiction, has once made and acted upon. Every reason advanced by the Court in support of this principle weighs against such judicial interference with the performance of a purely executive function. By such interference, the Court assumes executive functions; it shows disrespect to a coordinate branch of the Federal Government; it meddles in

questions about which it has less information than the executive officer who has made the decision; it exceeds the jurisdiction conferred upon it by Congress.

If authority to support so self-evident a proposition is needed, 42 Am. Jur., Public Administrative Law, Sec. 211, and particularly *Meadows v. U.S.,* 281 U.S. 271, and *U.S. v. Williams,* 278 U.S. 255, both dealing with executive decisions as to veterans' benefits, no judicial review of which was provided for.

It is submitted that the scope of review of this decision to which the District Court should have confined itself is limited to the question of whether the decision to admit plaintiff was so plainly unsupported by any evidence as to be outside the power of Colonel Smith to make; it is submitted that no Court could decide that his decision to admit plaintiff was altogether without support and that at the very worst, Colonel Smith had jurisdiction to err in making it, and was within his authority when he made it.

Other arguments could be made in support of the position that this decision to admit plaintiff was given insufficient weight by the District Court in this case; the well-known presumpton that an administrative officer did not violate his duty, in making the decision under attack, the principle that a decision collaterally attacked, as this decision has been attacked, may only be attacked for fraud, or for complete lack of jurisdiction, might both be called to the support of Colonel Smith's decision. Fundamentally, they are both corollaries of the point made above—that the executive agent whose task it is to make a decision must be al-

lowed to make it without judicial interference, except where the decision is clearly wrong. The conduct of a government which depends on so many executive decisions would otherwise be impossible.

Because the employees who injured plaintiff were acting within the scope of their employment, and because plaintiff's admission to DeWitt General Hospital was authorized, it is clear that the action of the District Court should be reversed, and the case remanded for a new trial.

Dated, San Francisco, California,
June 12, 1950.

Respectfully submitted,
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